Supreme Court of the United States

OCTOBER TERM, 1945

NO. 800

STATE EX REL. H. LESLIE QUIGG, *Petitioner*

vs.

CHARLES O. NELSON, *Respondent*

BRIEF OF PETITIONER

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NO......

H. LESLIE QUIGG, *Petitioner*

vs.

CHARLES O. NELSON, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

The Opinion of the Court Below

The opinion of the Supreme Court of Florida is reported in 23 Southern Reporter (2d) 136 (not yet officially reported but a copy is attached to the certiorari petition).

B.

Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Title 28 U.S.C.A., Section 344 (b), (Judicial Code, Section 237 (b), as amended by the Act of February 13, 1925).

C.

The Federal Questions

1. Was Petitioner deprived of his property rights of office and pension without due process, in violation of the Fourteenth Amendment to the United State Constitution, when

three of the five members of the City Commission trying the Petitioner, after striking charge No. 7 against the Petitioner from the record, purported to reinstate said charge and to remove Petitioner from office thereon, because the Commissioner who cast the deciding vote for its reinstatement and removal of Petitioner thereon, did so, despite his declared "honest belief" that said charge should be stricken, because he was told to do this by a Miami newspaper?

(1) The Supreme Court of Florida necessarily passed upon this Federal question, though not by exrpess languare, because:

(a) Petitioner alleged in his quo warranto information:

> "that the attempted reinstatement of said Charge No. 7 by said City Commission against the Relator, and the removal of the Relator from his office on said charge No. 7, constitutes taking and depriving him of his property rights of office, and his pension rights to which he is lawfully entitled without due process of law, contrary to the 14th Amendment of the Constitution of the United States."*

(b) Respondent's demurrer to the information (Ground 34 thereof), averred inter alia**:

> ". . . . . that since the said relator was given an opportunity to be heard in his own behalf to produce any and all witnesses, the reinstatement of said Charge 7, and the hearing of evidence upon same, was, in all respects, valid, *constitutional* and in compliance with the Charter of The City of Miami."

(c) The Circuit Trial Judge, in his order and opinion overruling Respondent's demurrer, held***:

> "The several issues of law are projected out clearly, plainly, fully, and distinctly by the Information of Relator, H. Leslie Quigg, and by the Demurrer thereto of the Respondent, Charles O. Nelson."

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*Transcript of record, Page 20.
**Transcript of record, Page 42.
***Transcript of record, Page 57.

And also:

> "From the record, the Court here and now finds, concludes, decides, adjudicates, and rules, that the conviction of H. Leslie Quigg, Relator, and his removal from office, described in the record were each unreasonable, unjustified, contrary to right and justice, illegal, unconstitutional, and without foundation in fact or law, and were of no legal significance, importance, or consequence whatsoever, and were null and void acts."

(d) Respondent assigned as error in his appeal to the Supreme Court of Florida this ruling of the Trial Judge as follows:

> "The Court erred in entering its OPINION AND ORDER ON RESPONDENT'S DEMURRER TO RELATOR'S INFORMATION,"*

(e) The Supreme Court of Florida, in its opinion, said in referring to this assignment of error:

> "As to all other assignments of error and questions presented, we find, upon an examination of the entire record, no harmful or prejudicial error,"

and accordingly reversed the judgment of ouster of the Lower Court in favor of the Petitioner.

2. Interwoven with Federal question No. 1, and at the same time necessarily passed upon and decided by the Supreme Court of Florida adversely to the Petitioner, is whether the Petitioner was denied a fair trial under the circumstances mentioned in question No. 1 above, in violation of the Fourteenth Amendment to the United States Constitution, when disqualification of the Commissioner who brought about the reinstatement of said charge No. 7 and accomplished the removal of the Petitioner on said charge, was refused by said Commissioner, on Petitioner's timely motion therefor, when it became apparent that he had become unduly preju-

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*Transcript of record, Page 74.

diced and influenced against the Petitioner by reason of said newspaper.

3. Necessarily passed upon and decided adversely to the Petitioner by the Supreme Court of Florida, was Petitioner's contention in his quo warranto information that he was denied a fair trial by the City Commission when said Commission failed to apply a section of the Municipal Traffic Code which authorized the Chief of Police to exercise discretionary judgment in emergencies, and by sanctioning the removal of the Petitioner for non-enforcement of Municipal Ordinances which the City Manager, as chief executive officer of the City, ruled should not be enforced, and prevented the Petitioner from enforcing, by his arbitrary and capricious action in preventing him from securing necessary evidence to prosecute ordinance violators, said ordinances.

4. The Supreme Court of Florida denied the Petitioner a fair trial and deprived him of his property rights of office and pension, without due process of law in violation of the Fourteenth Amendment to the United States Constitution, when it reversed the Circuit Judge, who held Petitioner's removal from office unconstitutional and illegal, and affirmed his removal by the City Commission on the ground that the Petitioner should have enforced a penal statute of Florida against members of a labor union which it subsequently held had not been violated by such union members.

5. The Supreme Court of Florida, by its decision necessarily passed upon and decided that due process, as defined by the Fourteenth Amendment to the United States Constitution, did not require testimony of adverse witnesses, produced at Petitioner's trial before the City Commission, to be given under the sanctity of an oath.

6. The Supreme Court of Florida necessarily denied the Petitioner a fair trial and deprived him of his property rights of office and pension, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, by finding that the Petitioner's sole neglect

of duty consisted of matters and things of which he was expressly acquitted by the City Commission, contrary to the rule announced in the opinion that the Court could not substitute its judgment for that of the City Commission.

7. The Supreme Court of Florida necessarily deprived the Petitioner of the equal protection of the law, and deprived him of his property rights of office and pension, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, when they failed to follow the express provisions of the State statute requiring the removal of the Petitioner to be accomplished by a four to one vote of the City Commission, and sanctioned his removal from office on a three to two vote of said City Commission.

The authorities in support of these Federal questions sustaining the Supreme Court's jurisdiction we have incorporated in our petition for certiorari under the heading "B", entitled "Statement as to Jurisdiction." (See statement of case). A similar statement of cases appears under the heading "A" in the petition for writ of certiorari, and, in the interest of brevity, is incorporated here by reference.

D.

Specifications of Error

1. The Supreme Court of Florida erred in failing to hold with the Trial Court that a chief of police, protected from arbitrary removel by civil service provisions of a city charter, has been deprived of his property rights of office without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, when he is removed from office on the ground of neglect of duty because, in good faith and in the exercise of his best judgment, he adopted lawful and peaceful means, as he was allowed to do under a City ordinance, to promptly dissolve a serious emergency and traffic hazard that paralyzed the public transportation system of two municipalities and threatened to suspend the municipal water supply, especially where he had no reasonable oppor-

tunity prior to his removal to cause the arrest and punishment of the offenders.

2. The Supreme Court of Florida erred in failing to hold with the Trial Court that a chief of police, protected from arbitrary removal by civil service provisions of a city charter, has been deprived of his property rights of office without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, when, solely by reason of political pressure brought to bear on the commission by a newspaper hostile to the chief, the city commission after striking a charge against the chief of police, on their own motion reinstated the charge and removed the chief of police on the same.

3. The Supreme Court of Florida erred in failing to hold with the Trial Court that a chief of police, protected from arbitrary removal by civil service provisions of a city charter, has been deprived of his property rights of office without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, when one of the commissioners who cast the deciding vote against him, refused to disqualify himself as one of the judges trying the then chief, upon the chief's timely motion therefor, when said commissioner was prejudiced and biased against the chief and unable, by reason of such prejudice, to give the chief of police a fair and impartial trial.

4. The Supreme Court of Florida erred in failing to hold with the Trial Court that a chief of police, protected from arbitrary removal by civil service provisions of a city charter, has been deprived of his property rights of office without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, when the Supreme Court of Florida affirmed his removal on the ground that he had neglected his duty to enforce against union bus drivers a State law against strikes, which law they subsequently held had not been violated by the bus drivers.

5. The Supreme Court of Florida erred in failing to hold with the Trial Court that a chief of police, protected from

arbitrary removal by civil service provisions of the city charter, has been deprived of his property rights of office without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, when the witnesses produced against him during his trial which resulted in his removal were not required, upon timely objection by the chief, to give their testimony under sanctity of an oath.

6. The Supreme Court of Florida erred in failing to hold with the Trial Court that a chief of police, protected from arbitrary removal by civil service provisions of the city charter, has been deprived of his property rights of office without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, when the Supreme Court of Florida, notwithstanding its holding that a court could not substitute its judgment for that of a city commission trying a chief of police, nevertheless affirmed his removal from office and based the reason for its decision upon the subject-matter of a charge upon which the city commission found the chief not guilty.

7. The Supreme Court of Florida erred in failing to hold with the Trial Court that a chief of police, protected from arbitrary removed by civil service provisions of a city charter, has been deprived of his property rights of office without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, and denied the equal protection of the law, contrary to said amendment, when the Supreme Court of Florida affirmed the chief's removal, notwithstanding that he was removed by less than a two-thirds vote of the city commission trying the chief which the statute governing such removal required.

E.

ARGUMENT.

First Specification of Error

1. Both by city ordinance and the general law the Chief of Police has discretionary power to assist labor union leaders to secure an appeal bond for an incarcerated union member in order to relieve a serious emergency.

(a) *Wilkes v. Dinsman*, 48 U. S. 89, 12 L. Ed. 618. Here the Court said, at Page 637:

> "In a case in this country (Jenkins v. Waldron, 11 Johns. 121), Spencer, J., says, for the whole court, on a state of facts much like the case in East: 'It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.' Similar views were again expressed by the same court in the same volume, p. 160, in Vanderheyden v. Young. And in a like case, the Supreme Court of New Hampshire recognized a like principle. 'It is true,' said the Chief Justice for the court, 'that moderators may decide wrongly with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be without remedy.' But there is no liability in such case without malice alleged and proved. Wheeler v. Patterson, 1 N. H. 90.
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> "Finally, in this court, like views were expressed, through Justice Story, in Martin v. Mott, 12 Wheat. 31: 'Whenever a statute gives a discretionary power to any person, to be "exercised by him upon his own (*132) opinion of certain facts, it is a sound rule of construction that the statutes constitute him the sole and exclusive judge of the existence of these facts". 'Every public officer is presumed to act in obedience to his duty, until the contrary is shown'."

(b) *Section* 301 of Miami Traffic Code, Ordinance No. 2574 of The City of Miami, reads:

> "301. DUTIES OF POLICE. That hereafter it shall be the duty of Police Officers of this City to enforce the provision of this ordinance, and they are hereby vested with all the power and authority necessary for the enforcement thereof, provided that, in the event of a fire or other emergency or to expedite traffic or to safeguard pedestrians, or when necessary to protect property, officers of the Police or Fire Divisions may direct, as conditions may require, contrary to the provisions herein contained."

(c) *State, ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 122 N. E. 39. In this case the Court said, at Page 40:

> "Every officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty."

(d) In *People v. Galpern*, 259 N. Y. 279, 181 N. E. 572, the New York Court of Appeals said at Page 572:

> "The duty of police officers, it is true, is 'not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions.' People v. Nixon, 248 N. Y. 182, 188, 161 N. E. 463, 466. Then they are called upon to determine both the occasion for and the nature of such directions. Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty."

(e) *People v. Nixon*, 248 N. Y. 182, 161 N. E. 463. At Page 466 of this case the Court said:

> "Police officers are guardians of the public order. Their duty is not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions. Present at the point where the defendants were congregating they might early sense the possibility of disorder."

2. The City Manager ruled that the bus drivers should not be prosecuted for violation of municipal ordinances.* He also denied that he had suspended the Chief of Police for neglect of duty in not enforcing any state law.** The City Manager suspended the Chief of Police before he had any reasonable opportunity to arrest and cause the punishment of bus drivers violating municipal ordinances.*** The demonstration occurred on March 29th, 1944, and the Petitioner was suspended on April 10th, 1944. The City Manager hindered the Chief of Police from getting the necessary

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*Transcript, Page 304.
**Transcript, Page 305.
***Transcript, Page 313.

evidence to cause the arrest and punishment of those responsible for the emergency condition which was created by:

(1) Refusing to let him participate in the City Manager's investigation;* (1)

(2) Instructing police witnesses not to discuss the matter with anyone;* (2)

(3) Tying up all essential witnesses on an independent investigation of his own;* (3)

Under these circumstances, the Chief of Police cannot be guilty of neglect of duty in failing to enforce municipal ordinances.

(a) *McCarthy v. Board of Alderman of the City of Central Falls*, 38 R. I. 385, 95 A. 921. In this case the Court said, on Page 924 of 95 Atlantic, in the case of a police officer removed for failure to enforce the law:

> "The gist of the charges is the petitioner's failure to do certain acts which it is implied he could have done and ought to have done as part of his official duties. Both the duty and the ability to perform the acts must be shown in order to establish the charge of official misconduct. If he did all that he could reasonably be expected to do in the premises, and if the acts required to be performed could only be done by virtue of legal process, for the granting of which no legal reason was known to exist, or if the issuance of process was refused by those having authority to do so upon his application therefor in good faith, there would be no misconduct in failing to perform the acts named in the

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*Judicially admitted by failure to deny. See Par. VIII, quo warranto information, Tr. 11, et seq.

(1) Exhibit A, Vol. II, 298, 312-313, 335; Vol. III, 744.
(2) Exhibit A, Vol. II, 280; Vol. III, 744.
(3) Exhibit A, Vol. II, 346-347.

charges. As a result of examining the evidence, therefore, we are of the opinion that there was no evidence to sustain the decision of the board of alderman. The evidence shows that the petitioner promptly applied first to the clerk and then to the justice of the district court of the Eleventh Judicial District, in which the city of Central Falls is situated, for warrants against the persons named in the first two charges against him, accompanied by a statement of evidence as contained in the police officers' reports, and that both clerk and justice declined to issue warrants against those persons. The justice and clerk both testified to this. As to these charges there is no evidence of dereliction of duty on the part of the petitioner."

(b) In the case of *Hanna v. Board of Alderman of the City of Pawtucket*, 54 R. I. 392, 173 A. 358, the Court said, on Page 360 of 173 Atlantic, in speaking of the removal of a police officer for misconduct for neglecting to perform certain acts of official duty:

"To establish the charges of misconduct, both the duty and the ability to perform the acts required must be shown. McCarthy v. Alderman, Central Falls, supra. Petitioner made his reports regularly to the mayor who was his superior officer, and followed the instructions of the mayor and the board of alderman as he understood them. In many instances he was unable to secure warrants on his complaints. The reason for the refusals to issue warrants was stated by the clerk of the court to be that the policy of the court and of the city officials was that for a time infractions of the liquor law should be dealt with by securing a revocation of the license of the lawbreaker rather than by prosecution in the courts.

With respect to petitioner's failure to act against the proprietor of the saloon at 182 Pleasant street, the evidence shows that for several months this man was permitted by the license commission to conduct his business without a license on his promise to pay the license fee in installments. This action of the board was without legal warrant. Having thus countenanced infractions

of the liquor laws at this location, the board cannot properly hold the petitioner responsible for the failure to prosecute such other infractions of the license law as the board selected. For the reasons stated, the respondents' motion to dismiss is denied."

Second and Third Specifications of Error

The facts which are germane to these specifications of error are set forth in Paragraph 4 of the petition for certiorari, under the heading "A", entitled "Summary Statement of Matters Involved" and are referred to herein by reference.

The reinstatement of charge No. 7 by three members of the Miami City Commission, and the removal of the Petitioner on said charge by reason of the political pressure of two editorials of the Miami Herald, and the refusal of Commissioner Hosea, after he had been reached by said editorials into casting the deciding vote to reinstate this charge and to remove the Petitioner on this charge, denied the Petitioner a fair trial and deprived him of his property rights of office and pension without due process of law, contrary to the Fourteenth Amendment to the United States Constitution. The Court will find the editorials of the Miami Herald which influenced Commissioner Hosea into casting the deciding vote to reinstate said charge No. 7, and his declaration showing that he had been reached by said newspaper, and the attempts of the Petitioner to disqualify him, all to be included in Paragraph IX of the quo warranto information on Pages 13 to 21 of said transcript, inclusive.

The following authorities support the rule that under these circumstances the Petitioner was denied a fair and impartial trials and deprived of his property rights of office and pension without due process of law, contrary to the Fourteenth Amendment to the United States Constitution:

(a) *State, ex rel, Felthoff v. Richards* (1932), 203 Ind. 637, 180 N. E. 596.

(b) *Miles v. Stevenson*
(1894), 80 Md. 358, 30 Atl. 646.
(c) *Delaney v. Board of Fire Com'rs of City of Detroit*
(1928), 244 Mich. 64, 221 N. W. 283.
(d) *Packwood v. Riley,*
196 N. Y. Supp. 743.
(e) *People v. Riley,*
(1922), 232 N. Y. 283, 133 N. E. 892.
(f) *Rosecrans v. Town of Westfield, et al,*
(N. J. 1919) 157 A. 146.
(g) *Kelly v. Bishop, et al,*
(N. J. 1922), 119 Atl. 6.
(h) *In re Greenebaum*
(1911), 201 N. Y. 343, 94 N. E. 853.
(i) *Ryan v. City of Everett, et al,*
(1922), 121 Wash. 342, 209 P. 532.
(j) *People, ex rel. Mitchell v. LeGrange, et al,*
(1896), 37 N. Y. S. 991, 2 App. Div. 444.
(k) *Coolidge, Mayor v. Bruce, District Judge*
(1924), 249 Mass. 465, 144 N. E. Rep. 397.
(l) *People, ex rel. Winspear v. Kreinheder, et al,*
(1921), 189 N. Y. S. 767, 197 App. Div. 887.
(m) *People, ex rel. Shires v. Magee*
(1901), 67 N. Y. S. 906, 57 App. Div. 281.
(n) *State Board of Funeral Directors and Embalmers v. Cooksey,* (1941), 148 Fla. 271, 4 So. (2d) 253..

Fourth Specification of Error

This specification invokes the Fourteenth Amendment to the United States Constitution by presenting the question of Petitioner being denied the equal protection of the law as provided in said amendment.

One of the charges of removal filed against the petitioner upon which he was removed from office was that the petitioner, as Chief of Police, failed to enforce a statute of the State of Florida. In the removal proceedings before the City Commission, the City Manager was ordered to furnish petitioner with a Bill of Particulars. The Bill of Particulars specify that the petitioner had failed to enforce the Florida No-Strike Law. (See Page 23, Volume I, Transcript of Testimony.) The No-Strike Law was referred to as Chapter 21968, Laws of Florida, 1941. This was error. It should

have been Chapter 21968, Laws of Florida, 1943. This law is also known as Section 481.09, F. S. A. (Florida Statutes Annotated).

The evidence in support of this charge discloses that one W. O. Frazier was president of a Miami Local Union of Bus Drivers and that the said Frazier and about one hundred other union bus driver members congregated at the Miami City Hall for the purpose of securing the release from custody of one of their union members, one C. F. Jaggears, who had that day been sentenced to a fifteen day jail sentence by the Municipal Judge of the City of Miami. (See Page 37 of Volume I of Transcript of Testimony).

The Supreme Court of Florida, in rendering its opinion, in the case of Nelson v. State, ex rel. Quigg, 23 So. Reporter, 2d, Page 136, among other things, stated:

> "We deem it sufficient to say that the answer to one of these questions is determinative of the case."

And thereupon, the said Supreme Court of Florida proceeded to determine whether or not the petitioner had or had not enforced Section 481.09, F. S. A., and in the opinion rendered by that Court, the Court held and adjudicated:

> "It is unnecessary to a proper determination of this controversy to detail the evidence which was before the City Commission. It is appropriate, nevertheless, at this moment, when the members of our armed forces dice with death on the far-flung battle fronts and our form of government, indeed our very existence, is being challenged by a large portion of the peoples of the earth, to refer as briefly as possible to the unbelievable situation which developed and was attendant upon the *MIAMI BUS DRIVERS' UNWARRANTED, UNOFFICIAL AND UNLAWFUL STRIKE*. This incident, coupled with its ramifications as disclosed by the evidence, presented ample justification for the ruling made by the City Commission. The congregation of buses about the courthouse in down town Miami, which was brought about by the *unauthorized* orders and directions of certain leaders of the *Bus Drivers' Union*, created a figurative

coronary thrombosis at the very heart of the metropolitan area. All parties to this controversy agree that a grave situation existed. Counsel for Quigg contend that he exercised his discretion and best judgment and should not have been removed even if his course had not been productive of satisfactory results. This was Quigg's position before the City Commission.

"But what course of conduct did Chief Quigg pursue? At the time of this strike *HE WAS THE PRINCIPAL LAW ENFORCEMENT OFFICER OF THE CITY OF MIAMI,* ****etc.

"During this *STRIKE,* according to Quigg's own testimony, he could have called to his assistance three hundred sixty-eight policemen within fifteen to forty-five minutes. **** etc.

"There were nine charges filed against the Chief of Police, two of which were quashed, he was acquitted on three and found guilty on four. The charges, on which the Chief of Police was convicted, accused him of neglect of duty by reason of his neglect and failure to enforce the Ordinances of the City of Miami and Criminal Statutes of the State of Florida; failure to bring about the apprehension, arrest and punishment of the persons who violated the said Ordinances and Statutes at and during the time of a *STRIKE* by the bus drivers in the City on the night of March 29, 1944, **** etc."

As has already been pointed out as disclosed by the Bill of Particulars filed, the Chief of Police was removed from office for failure to enforce the Florida No-Strike Law known as Section 481.09, F. S. A. That is one of the questions considered by the Supreme Court of Florida in reviewing the case of Nelson v. Quigg, Supra, as clearly appears from a reading of the opinion rendered. The opinion unequivocably finds that, as a matter of fact, an unwarranted, unofficial and unlawful strike was made by Miami union bus drivers on the night of March 29, 1944, and that Quigg did not arrest the so-called strikers for violating the above quoted section of the Florida Statutes and was thereby removed from office. The City Commissioners trying the petitioner on the charges preferred by the City Manager held and adjudicated in effect

that there was a strike on said date; that the strike was unlawful and that the strikers participating in said strike were violating Section 481.09, F.S.A., and that the Chief of Police ought to be removed because of his failure to enforce the said State Statute.

In the quo waranto proceedings, by which proceedings the petitioner was restored to office of Chief of Police after his removal, which removal the petitioner insists was illegal, the Circuit Court Judge in entering the judgment of ouster, in effect found that there had been no strike on said occasion, either lawful or unlawful. In reviewing the judgment of ouster, the Supreme Court of Florida reversed the finding of the learned Circuit Judge and affirmed the finding of the City Commissioners of the City of Miami to the effect that there had been a strike of these union bus drivers and that said strike was unwarranted, unofficial and unlawful, and that the participants of said strike were violating Section 481.09, F.S.A., and that, therefore, the judgment of ouster was reversed and set aside and the petitioner was ordered removed from office.

It clearly appears from the record in this case that one W. O. Frazier was the president of the Bus Drivers' Union allegedly participating in the unwarranted, unofficial and unlawful strike. It further clearly appears that upon the arrival of the petitioner to the scene of the demonstration on the night of the alleged strike, the petitioner sought out and contacted the said W. O. Frazier as president of the Bus Drivers' Union, and other persons. It further clearly appears that if it was the duty of the petitioner to arrest anyone for violating Section 481.09, F.S.A., on said ocassion, W. O. Frazier, one of the leaders and one of the participants in said demonstration and the president of the union so participating, was one of those persons whom the petitioner should have arrested; that this is so, there can be no dispute. As the petitioner in his testimony testified that upon arriving at the scene, that he did contact Frazier; that Frazier made known to the Chief of Police his alleged grievance; that, thereupon, the petitioner, as Chief of Police, pointed out

to the said Frazier the provisions of Section 932.52, F.S.A., which provides that any person convicted of any offense in any Municipal Court (in the State of Florida) may appeal from the judgment of such Court to the Circuit Court of the county in which the conviction took place within thirty days after the conviction, and that the person so appealing shall enter into a bond for double the amount of the fine and costs assessed, or, if the judgment be one of imprisonment for a term in jail of said municipality, then the bond shall be in an amount sufficient to cover all costs taxed in the Circuit Court on appeal, plus not less than $10.00 nor more than $200.00 additional in the discretion of the Mayor or the Municipal Judge, with one or more sufficient sureties to be approved by the Clerk of the Circuit Court. And the said Section of the Statute further provides for the terms and conditions of said bond. The said Frazier explained to the petitioner that the Municipal Judge had declined to set a bond.

When the said Frazier stated his willingness to enter into such bond as provided by State Law, the petitioner called to his office the Clerk of the Circuit Court. The bond was thereupon executed, posted and approved, and the incarcerated Jaggears was released on appeal and the demonstration ended. So, there can be no question but that the petitioner did contact the said Frazier. It is also admitted here, as well as in the record, that the petitioner did not arrest or attempt to arrest W. O. Frazier for violating the Florida No-Strike Laws, Section 481.09, F.S.A. However, the said W. O. Frazier was subsequently informed against by the County Solicitor, the state prosecutor of all violations of state criminal law less than capital cases, and that the said W. O. Frazier was, based upon the facts and happenings on the night of March 29, 1944, and relating to the demonstration of said bus drivers, charged with violating Section 481.09, F.S.A., and, upon the arrest of the said Frazier on said charge, be sued out in the Circuit Court of Dade County, Florida, a petition for a writ of error. Upon a hearing before the Circuit Judge, the said Frazier was remanded to the

custody of the respondent sheriff. Being dissatified, the said Frazier sued out an appeal to the Supreme Court of Florida. See State, ex rel Frazier, v. Coleman, Sheriff, 23 So. 2d, 477. By the issues presented in the habeas corpus proceedings, the Supreme Court of Florida was required to and did determine whether or not the said W. O. Frazier had violated the Florida No-Strike Law, Section 481.09, F.S.A., and the Supreme Court of Florida in so doing, held and adjudicated:

> "The charge in the information involved in this appeal is that the appellant and the other 98 named defendants unlawfully agreed, conspired, combined and confederated between themselves to, and did actually participate in 'a strike, walkout and cessation of work and continuation thereof without the same being authorized by a majority vote of the employees to be governed thereby,' contrary to the provisions of chapter 21968, Laws of Florida, 1943, F.S.A., and Section 481.01, et seq., F.S.A."

The above quoted part of the Florida Supreme Court decision contains the verbatum language of the information upon which the said Frazier was arrested. The opinion recites that the charge grew out of the demonstration wherein the union bus drivers were attempting to secure the release of one C. L. Jaggears. From a reading of the opinion in the case of Nelson v. Quigg, Supra, and the case of Frazier v. Coleman, Supra, it clearly and unequivocally appears that the time and place discussed in those two opinions is the same identical incident or demonstration. The Florida Supreme Court, in determining whether or not the said Frazier had as a matter of fact violated the said Florida No-Strike Law, further held and adjudicated in its opinion that:

> "Chapter 21968, Laws of Florida, 1943, purports to be an act to regulate the activities and affairs of labor unions, their officers, agents, organizers and other representatives. Section 9 of the act prohibits members of a labor union from participating in any 'strike, walk-out, or cessation of work or continuation thereof without the same being authorized by a majority vote of the employees to be governed thereby'. The word 'strike' is not defined in the statute; consequently in the absence of a

legislative definition at variance it must be presumed that the legislature intended to use the term in its plain and ordinary signification. Smith v. State, 80 Fla. 315, 85 So. 911; State v. Tunnicliffe, 98 Fla. 731, 124 So. 279. The commonly understood meaning of the term is: 'Act of quitting work; specif., such an act done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer; a stopping of work by workmen in order to obtain or resist a change in conditions of emplyoment'. (And authorities therein cited.) As is indicated by the definition, the term ordinarily connotes a movement growing out of problems arising between the employee and the employer class, relating to hours, wages, or employment conditions, in the course of which there is a concerted suspension of employment by the employees for the purpose of enforcing certain demands against the employer, or employers. As Teller points out in his work entitled 'Labor Disputes and Collective Bargaining,' the outstanding characteristics of the strike, as that term is employed in modern times, are (1) an established employer-employee relationship between the strikers and the person or persons against whom the strike is called; (2) the existence of a dispute between the parties and the resort by labor to the weapon of concerted refusal to work as a means or method of persuasion or coercion to accomplish the employees' demands; and (3) the contention on the part of the employees that although work has ceased the employer-employee relationship continues, albeit in a state of belligerent suspension. Teller, Labor Disputes and Collective Bargaining, Vol. 1, Sec. 78, p. 236.

"It takes no more than a cursory examination of the information under attack to ascertain that the facts alleged do not present a case that may be prosecuted under the statute involved, for the elements essential to a strike are not present. There was no employer-employee relationship between the disputants. There was no existing controversy between the bus drivers and their employers as to hours, wages, or conditions of labor. The enterprise was not conceived for the purpose of forcing the employers, individually or as a class, into compliance with any demands made by such employees. The venture was not set in motion to punish employers or to better the working conditions of employees generally. The actions of the appellant and his misguided

companions in storming the municipal judge's chambers for the purpose of procuring the release of Jaggears—though thoroughly reprehensible and subject to censure—did not, therefore, constitute a strike but was a contumacious and lawless act directed against the municipal court of Miami and its authority in defiance of law and order, with none of the characteristics of a labor betterment movement."

Thus, we see that the Supreme Court of Florida, in reviewing the facts surrounding the activities of the said Frazier and other members of the union bus drivers, adjudicated and held that said acts were not and did not constitute a strike; that this is so is academic and, as pointed out in the above quoted opinion, a laborer can only strike against his employer. He cannot strike against some third person unconnected with his employer. When the petitioner arrived at the scene of this demonstration and asked the leader of the demonstration, Frazier, what was the complaint and, when informed that the union leaders were seeking the release from imprisonment of a fellow member, the Chief of Police, petitioner, from his many years as Chief of Police and law enforcement officer, immediately recognized that there was no strike, either lawful or unlawful. The petitioner knew almost as if by instinct that the Florida No-Strike Law, Section 481.09, F.S.A., had not been violated and that he could not successfully prosecute Frazier thereunder. That his judgment was correct is borne out by the opinion of the Supreme Court of Florida rendered in the case of Frazier v. Coleman, Supra.

Justice Brown, of the Florida Supreme Court, in dissenting, held and adjudicated:

> "Under the facts alleged in the information in this case, Sec. 9(3) of Chapter 21968, F.S.A., Sec. 481.09 (3), is inapplicable, and it is unnecessary, and would indeed be inappropriate, for this court to express any opinion as to the constitutional validity of said statute."

That the petitioner here was denied the equal protection of the law is clear and apparent from the reading of the two

above cited opinions and judgments of the Florida Supreme Court. The opinion in the case of Nelson v. Quigg, Supra, was rendered on July 24, 1945, and petition for rehearing was denied on September 10, 1945. The opinion and judgment of the Florida Supreme Court in the case of State, ex rel Frazier v. Coleman, Supra, was rendered on October 5, 1945.

Thus, we have the unusual and unreasonable situation of a Chief of Police being removed from office because of his failure to arrest one W. O. Frazier for violating Section 481.09, F.S.A., and on the other hand, the said W. O. Frazier, being discharged on Habeas Corpus because the same identical acts committed by the said Frazier did not constitute a violation of the said statute. This is not a question of a Supreme Court decision construing a State Statute upon different facts, but is a situation wherein the State Court of last resort says that the same identical acts committed by the same identical person constitute a violation of a State Statute in one case, and in the other case says that the said acts committed by the said persons do not constitute a violation of the said statute.

It clearly appears from a reading of the two cited cases that there was no strike either lawful or unlawful and, had the petitioner here been granted the equal protection of the laws of the State of Florida, he would not have been removed from the office of Chief of Police of the City of Miami because of his failure to arrest W. O. Frazier and charge the said Frazier with violating Section 481.09, F.S.A.

We sincerely and respectfully insist that the petitioner's constitutional rights have been invaded and violated and that the invasion and violation was accomplished by a denial to the petitioner of an equal protection of the laws.

Fifth Specification of Error

At the hearing before the City Commissioners on the charges, the witnesses appearing to testify against the Peti-

tioner were sworn by the Mayor acting as Chairman of the Commission. At these proceedings, the Petitioner objected to the witnesses testifying and also moved to strike the testimony of the respective witnesses because of the lack of any legal authority on the part of the Mayor to administer an oath. The City Charter of the City of Miami does not confer on the Mayor any power to administer an oath; the Statutes of the State of Florida do not empower a Mayor of a municipality to administer oaths, except when he is presiding as a judge of the municipal Court in trying offenses against the ordinances of such city or town. This Court, in the case of the United States v. Curtis, 107 U. S. 671, 2 S. Ct. 501, 27 L. Ed. 534, said:

> "It is fundamental in the law of criminal procedure that an oath before one who has no legal authority to administer oaths of a public nature, or before one authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or subject the party to taking it to prosecution for the statutory offense of wilfully false swearing. 1 Hawk, P. C. b. 1., C. 27, Par. 4, p. 430 (8th Ed. by Curwood); Roscoe, Cr. Ev. (7th Am. Ed.) p. 817; 2 What. Crim. Law, Par 221; 2 Arch Crim. Pr. and Pl. (8th Ed p. 1722)."

The Florida Supreme Court in the case of Campbell v. State, Florida (1926) 109 So. page 809, held that statutes conferring the authority to administer oaths upon officials who had no such authority under the common law should be construed strictly, and in that case said:

> "It seemeth clear that no oath whatsoever, taken before a person acting merely in private capacity, or before those who take upon them to administer oaths of a public nature without legal authority for their so doing, or before those who are legally authorized to administer some kind of oaths, but not those which happen to be before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colorable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are no manner of force, but are altogether idle."

and quoted the Supreme Court of the United States in the Curtis case. The question therefore arises: Was an oath necessary in this particular kind of proceeding? We think this question is well answered by the New York Court of Appeal, in the case of Kasschau v. Board of Police Commissioners of the City of New York, 155 N. Y., 40, 49 N. E. 257. In that case the New York Court said:

> "The relator was not subject to removal except for some legal cause, to be ascertained and adjudged as matter of fact upon a hearing. This contemplates a judicial investigation, in which there must, at least, be some legal responsibility for perjury, or some protection to the accused against falsehood. The issue to be determined was one of fact. The proceeding was judicial in character, and hence the tribunal before which the investigation was had could not dispense with the usual form of procedure by acting upon statements not given under the responsibility of an oath. When the Court proceeded to judgment without the observance of such an essential prerequisite to every judicial inquiry, the determination was not judicial in character, or such as the statute contemplates. While some latitude is allowed with respect to the rules of evidence, yet, to remove a party from a public office, upon a charge involving a question of fact, without even swearing the witnesses, is to abandon the fundamental form of judicial action. A determination thus made is not the result of a trial or a hearing, in any proper sense, and hence the relator was removed from office without such a trial or hearing as the law contemplates. The statute confers power upon the defendants to formulate rules for the government of their proceedings, and one of the rules enacted under this power provides that the testimony upon such a hearing must be on oath, except in trivial cases. t would be difficult to show that they have power in any case, when acting in a judicial character, to enact a rule dispensing with an oath to witnesses, since such a rule would be repugnant to the very nature of a trial or hearing. But, however that may be, it is safe to assert that a proceeding which results in the removal of a person from office cannot well be called a trivial case. If the charge was trivial, the punishment was not. The judgment was that the relator should be removed from the force, and this was the highest penalty that the defendants had the power to inflict. So that, if this was a trivial case, then all such cases, resulting in the same

determination, must be trivial, whatever may be the nature of the charge. When a party is protected in the enjoyment of a public office or employment, from removal except for cause, to be ascertained and adjudged upon a hearing of a judicial nature, and it appears that he has been removed without any proof of the necessary facts upon oath, the determination, if not absolutely without jurisdiction, is clearly erroneous, as matter of law. It is no answer to this objection to say that the relator did not require the witnesses to be sworn, or that he failed to take any exception to the proceeding. The burden of making out the case was upon the prosecution. The accused may remain silent, and the omission of the relator in this case to interfere with the duties of the commissioners cannot cure the defect referred to."

This question was squarely presented to the Supreme Court of the State of Florida by the information, demurrer thereto, and the decision of the Lower Court,* but was altogether ignored. The Court did not recede from its previous decisions but simply denied to the Petitioner the equal protection of the law by ignoring this question and removing him from his office for the sole reason that the Supreme Court thought he had shown too much consideration to the labor union.

Sixth Specification of Error

This specification, upon being carefully analyzed, clearly demonstrates that the Supreme Court of Florida did deny to this petitioner the equal protection of the laws and by so doing has deprived this petitioner of the benefits and guarantees contained in the Fourteenth Amendment to the United States Constitution.

The law of the State of Florida, as it has existed for many, many years and as was stated in the Supreme Court opinion in the case of Nelson v. State, ex rel Quigg, Supra, is, quoting said Supreme Court:

"We have held, and it seems to be an almost universal

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*Par. XI, quo warranto information, Transcript 23.

> rule, that the findings of fact made by an administrative board, bureau, or commission, in compliance with law, will not be disturbed on appeal if such findings are sustained by substantial evidence. Hammond v. Curry, 153 Fla. 245, 14 So. 2d, 390; Jenkins v. Curry, Fla., 18 So. 2d, 521; Callahan v. Curry, 153 Fla. 744, 15 So. 2d, 668; Marshall v. Pletz, 317 U. S. 383, 63 S. Ct. 284, 87 L. Ed. 348; Virginia Electric & Power Co. v. National Labor Relations Board, 319 U. S. 533, 63 S. Ct. 1214, 87 L. Ed. 1568; Broxson v. State, 99 Fla. 1187, 128 So. 628; Smith v. Midcoast Inv. Co. 127 Fla. 455, 173 So. 348; Marcus v. Hull, 142 Fla. 306, 195 So. 170."

Notwithstanding the fact that the Supreme Court of Florida stated the law applicable to an appeal court reversing findings of an administrative board, the Supreme Court of Florida proceeded to do just exactly what the opinion said was prohibited in this state.

Ground No. 3 in the specification of charges preferred against the petitioner by the City Manager of the City of Miami, reads as follows:

> "3. You are guilty of misfeasance in the office of Chief of Police in the Division of Police of the City of Miami, Florida, by reason of the fact that, in violation of your oath of office, you devoted your time and your energies at and during the time of a strike of bus drivers in said City on the night of March 29, 1944, to meeting the demands of the leaders of the drivers, who were violating in your presence and under your observation the ordinances of said City and the criminal statutes of the State of Florida, and in aiding and abetting said leaders to effect the release from the City jail of a prisoner who had been lawfully convicted in the Municipal Court of said City and had been lawfully sentenced to imprisonment in said jail."

The City Commission of the City of Miami, the administrative board, having heard the evidence offered by the City Manager in support of said charge, did, by a four to one vote, find the petitioner not guilty of said charge and did acquit him thereon. Then, the Supreme Court of the State of Florida, denying to the petitioner the equal protection of the law, proceeded

to review and to reverse the finding of the City Commission of the City of Miami, finding the petitioner not guilty of Charge 3, when the Court used the following language in its opinion in reversing the Circuit Court:

> "Quigg was either incompetent as aforementioned or deliberate in the avoidance of his immediate duties. It appears that all the rest of his time and energies were devoted not to law enforcement or official duties but to a course of conduct prescribed, required and demanded by the leaders of the bus drivers' union. His conduct can be best described by the word which has become known and accepted universally as a synonym for the surname Chamberlain.
>
> "Fault is not to be found so much with the Chief because he assisted in securing the release on bond of a bus driver who had been incarcerated lawfully, an act which to the most fantastic mind does not come within the purview of his official duties, but rather that he failed to perform his duties and became an appeaser to the extent that he knuckled under to the intimidating demands and requirements of those whose conduct evidenced the fact that they would supplant law and order with mob violence."

Thus, it clearly appears that the Supreme Court of Florida substituted its judgment for the judgment of the City Commissioners trying the petitioner and found that the petitioner was guilty of Charge 3. We respectfully submit that this clearly constitutes a denial to the petitioner of an equal protection of the law.

It cannot be said that the Circuit Court Judge in entering the judgment of ouster, substituted his judgment of the sufficiency of the evidence for the judgment of the City Commissioners. The petitioner filed an information in the nature of a quo warranto. In Paragraph 10 of the Petition for quo warranto, the petitioner alleged the prejudice particularly of Commissioner Hosea and denied that he had received a fair trial because of the prejudice of said commissioner.

Paragraph 11 of the Petition for quo warranto alleged

the invalidity of the proceedings before the City Commission because the testimony of witnesses on behalf of the City Manager was not given under the sanctity of an oath and that the Mayor of the City of Miami did not have lawful authority delegated to him to administer an oath.

Paragraph 12 of the Petition for quo warranto alleged that the removal of petitioner by the City Commission was illegal and void because said removal was accomplished by a three-fifths vote, whereas the laws of the State of Florida provide that such removal shall only be done upon a two-thirds majority vote of the commissioners trying the accused.

To this Petition for quo warranto, the respondent Nelson interposed and filed a demurrer, the demurrer testing the legal sufficiency of the pleading. The office of a demurrer is to raise questions of law; questions of fact not being raised by a demurrer, but only by plea or answer. When the demurrer, interposed by the respondent Nelson, was argued before the Circuit Court Judge, the said Circuit Judge, in sustaining the demurrer, found:

> "From the record, the Court here and now finds, concludes, decides, adjudicates and rules that the conviction of H. Leslie Quigg, relator, and his removal from office described in the record, were each unreasonable, unjustified, contrary to right and justice, illegal, unconstitutional and without foundation in fact or law, and were of no legal significance, importance or consequence whatsoever and were null and void acts.
>
> "The several issues of law are projected out clearly, plainly, fully and distinctly by the information of relator, H. Leslie Quigg, and by the demurrer thereto of the respondent, Charles O. Nelson.
>
> "The information is not amenable or subject to any ground of said demurrer and said demurrer should be overruled."

Whereupon, the Circuit Judge overruled the demurrer. It was not necessary and the Circuit Judge did not, or did not at-

tempt to, substitute his judgment or interpretation of the evidence for the judgment or interpretation given by the City Commissioners. The Circuit Court rule was in accordance with the rule of law previously stated in this portion of the brief. The Circuit Judge gave an equal protection of the law to both the petitioner and the respondent.

The Supreme Court of Florida, in entering its judgment of reversal, recited in its opinion:

> "Many questions have been posed for our consideration and to aid us in a proper determination of this controversy. We deem it sufficient to say that the answer to one of these questions is determinative of the case. As to all other assignments of error and questions presented, we find, upon an examination of the entire record, no harmful or predudicial error."

In the appeal proceedings, the respondent here was the appellant. It was Nelson, the respondent, who assigned errors that the Supreme Court of Florida was called upon to review. The respondent assigned as error:

1. That the Circuit Court Judge erred in not disqualifying himself.
2. That the Circuit Court Judge erred in overruling Nelson's demurrer to the information.
3. That the Circuit Court Judge erred in sustaining the petitioner's demurrer to the answer of Nelson.
4. That the Circuit Court Judge erred in entering judgment of ouster.

Thus, we see that an order of the Circuit Court Judge was assigned as error, the order being an order overruling a demurrer and holding that the conviction and removal of the petitioner were unlawful, unconstitutional and void acts on the part of the City Commissioners of the City of Miami. To this assignment of error, the Supreme Court of Florida says that same was neither harmful nor prejudicial. It therefore developed that the Supreme Court of Florida, in order to

reverse the judgment of ouster appealed from, was called upon to try de novo on a cold typed transcript the question whether or not the petitioner was or was not guilty of Charge 3 as preferred against the petitioner by the said City Manager and, having tried said charge de novo, the Supreme Court of Florida substituted its judgment for the judgment of the City Commission of the City of Miami and, by so doing, denied to your petitioner an equal protection of the law. We have attempted to point out the inconsistences of the opinion rendered by the Florida Supreme Court, not for the sake of showing the inconsistencies but to emphasize the flagrant denial to this petitioner of the guarantees guaranteed to him by the Fourteenth Amendment to the United States Constitution, that is, that petitioner was denied an equal protection of the law and thereby was deprived of his property rights, and we respectfully submit that this fact alone clearly indicates the illegality of the judgment of reversal of the Supreme Court of Florida and, because of such illegality, the said judgment ought to be quashed by the Supreme Court of the United States.

Seventh Specification of Error

This question, although presented squarely to the Supreme Court of the State of Florida by the Petitioner in his brief and in the argument of counsel, was wholly ignored, as were many other questions presented and argued. The Florida Supreme Court, in the case of State ex rel Gibbs vs. Bloodworth, 134 Fla. 369, 184 So. 2, construing the City Charter under the provisions of which the Petitioner was removed from office, held that where the Charter was silent as to the method of removal of an officer, the general laws of the State should apply. Section 165.18, of the Florida Statutes 1941, provides:

> "The city or town council may judge of the election returns and qualifications of its own members, make such by-laws and regulations for their own guidance and government as they may deem expedient and enforce the same by fine or penalty, and compel attendance of its

members; and two-thirds of the council may expel a member of the same or other officer of the city or town for disorderly behavior or malconduct in office."

Certainly, three-fifths does not equal two-thirds; and as the City Charter is silent as to the number of votes necessary to remove the Chief of Police, then the same reasoning as applied by this Court in the case of Gibbs vs. Bloodworth would apply. Section 26. of the Charter of the City of Miami provides only that the City Commission shall hear such charges and render judgment thereon. Nowhere in the Charter is it specified the number of votes necessary for the City Commission to act, except when they do so by Ordinance or Resolution. The City Charter does provide that a majority of votes is necessary on all Resolutions and Ordinances, that a four-fifths vote is necessary on any Ordinance that is enacted as an emergency measure; but the Charter is utterly silent as to the number of votes necessary for the City Commission to render a judgment in hearings judicial in their nature. And, as the Florida Supreme Court did not recede from its position taken in the case of State ex rel vs. Bloodworth, it certainly denied the Petitioner the equal protection of the law. We are advised of the position that this Court has taken in several cases where it has held the Fourteenth Amendment does not assure uniformity of judicial decision from a precedent established by earlier decisions, and does not deprive the complaining party of the due process of law, but, in this case the Florida Supreme Court did not see fit to depart from established precedents or recede from its former decisions, but simply ignored the contentions made by the Petitioner, left the precedents established but denied to the Petitioner the benefit of them.

Conclusion

It is clearly submitted that, by virtue of the matters and things set forth in the petition and brief, and the authorities therein cited, Petitioner has been denied and deprived of his property rights of office and pension guaranteed and secured

to him under the United States Constitution and that the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

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